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No. 04-736

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CANADA, INC. and
MERCEDES-BENZ CANADA, INC.
Petitioners,

v.

GEORGE JAYNES, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH J. TABACCO, JR.
BERMAN DEVALERIO PEASE
TABACCO BURT & PUCILLO
425 California Street,
Suite 2100
San Francisco CA 94104
(415) 433-3200

J. DOUGLAS RICHARDS
Counsel of Record
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
49th Floor
New York, NY 10119
(212) 594-5300

Counsel for Respondents George Jaynes, et al.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

The District Court certified for interlocutory review the issue of whether Section 12 of the Clayton Act permits worldwide service of process upon corporate defendants in antitrust cases. Respondents opposed Petitioners' subsequent application for permission to file an interlocutory appeal before the First Circuit Court of Appeals, arguing that review of the certified issue was premature and that the order certified in fact involved no controlling question of law. In a simple order without explanation of its reasons, the First Circuit Court of Appeals declined in its discretion to accept the certified issue for interlocutory appeal. Petitioners filed the instant petition for writ of certiorari before this Court.

The question presented is:

> Should this Court grant the petition for writ of certiorari to review an order declining, without analysis, to permit interlocutory appeal of a ruling that does not meet the requirements for interlocutory appeal?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner and Defendant DaimlerChrysler Canada, Inc. ("Daimler Canada"), a corporation organized under the Canada Business Corporations Act, is a wholly owned subsidiary of DaimlerChrysler Corporation, a Delaware corporation wholly owned in turn by DaimlerChrysler Motors Company, LLC, a Michigan limited liability company that is wholly owned by DaimlerChrysler North American Holding Company ("DCNA"), a Delaware Corporation. DCNA is a wholly owned subsidiary of DaimlerChrysler AG, a publicly traded stock corporation organized under the laws of the Federal Republic of Germany.

Petitioner and Defendant Mercedes-Benz Canada, Inc. ("Mercedes Canada"), a corporation organized under the Canada Business Corporations Act, is a wholly owned subsidiary of DCNA.

Respondents George C. Jaynes, Jane A. Jaynes, Cathy-Ann Accomando, Richard Jaffe, Lisa Saizon, Daniel E. Herschberg, Deborah McComb, Andre Rodriguez, Barry Cushner, Jeffrey Coe, Bruce B. Belodoff, Lisa Baade and Perry Sadoff are natural persons.

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OPINIONS AND ORDERS BELOW

The opinion of the First Circuit Court of Appeals (Pet. App. 1a) is unreported. The District Court's Memorandum Decision and Order on Defendants' Motion to Dismiss for Lack of Personal Jurisdiction (Pet. App. 2a-25a) is reported at 307 F. Supp. 2d 145 (D. Me. 2004). The District Court amended its decision in an unreported opinion (Pet. App. 26a-27a) on April 20, 2004.

JURISDICTION

The First Circuit Court of Appeals entered its order denying permission for interlocutory appeal on August 3, 2004. On October 20, 2004, Justice Souter extended the time within which Petitioners could file a petition for a writ of certiorari to December 1, 2004, and the petition was filed on November 30, 2004. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

COUNTER-STATEMENT OF THE CASE

In their First Amended Consolidated Complaint ("FACC") plaintiffs alleged that Mercedes Canada, Daimler Canada and other American and Canadian automobile manufacturers and trade associations conspired with U.S and Canadian automobile dealers to prevent new motor vehicles purchased in Canada from entering the United States. Pet. App. 2a-3a. The FACC alleged that by means of this conspiracy, the named defendants suppressed and restrained interbrand competition for new motor vehicles, maintained U.S. new motor vehicle prices at artificially high levels and restricted the supply and/or output of new motor vehicles in the U.S. Pet. App. 2a-3a.

In Motions to Dismiss dated October 31, 2004, Defendants Mercedes Canada and Daimler Canada moved to dismiss this case for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). In a March 4, 2004 Memorandum Decision and Order, the District Court denied Daimler Canada's motion to dismiss and deferred ruling on Mercedes Canada's motion. Pet App. 3a. The District Court concluded that "the second, worldwide service, clause of section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with an alien venue statute." Pet. App. 6a. The court then observed that, with regard to Daimler Canada, the evidence showed that Daimler Canada dealers entered into non-export agree-

ments with their consumers, and sent a notice to dealers on both sides of the border that vehicle distribution outside the "dealer network" was prohibited, and that Daimler Canada would not provide warranty coverage for vehicles exported from Canada to the United States. Resp. App. 18a-19a. The District Court concluded that these activities met the standard for personal jurisdiction set out in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and further determined that the gestalt factors set out in *Ticketmaster-New York v. Alioto*, 26 F.3d 201, 207 (1st Cir. 1994), aligned in support of jurisdiction over Daimler Canada. Pet. App. 19a.

As to Mercedes Canada, the District Court held that "I therefore *defer* action on Mercedes-Benz Canada's 12(b)(2) motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery on the scope of sales of Mercedes Benz-Canada vehicles into the American market (through Mercedes-Benz USA) and concerning the scope of the Mercedes-Benz non-export agreements for Canadian vehicles." Pet. App. 22a (emphasis in original).

On May 4, 2004, Mercedes Canada and Daimler Canada ("Petitioners") filed a Petition for Permission to Appeal an Interlocutory Order in the First Circuit Court of Appeal. In their brief, Petitioners argued that substantial differences of opinion existed among the Circuit Courts of Appeals as to two issues in the order below: (1) whether plaintiffs can establish personal jurisdiction under Section 12 of the Clayton Act without first establishing venue under that statute; and (2) whether the "stream of commerce" doctrine could be used to establish minimum contacts sufficient to demonstrate jurisdiction.[1] Resp. App. 4a-5a. In their brief in opposition, Respondents urged that the First Circuit reject the request for

[1] In their Petition before this Court, Petitioners have abandoned the latter question as an issue presented for interlocutory review. Pet. Brief at i.

interlocutory review of the certified order because, inter alia, (1) such review was premature, in that a successful appeal would have disposed of claims against but one of seventeen defendants and because such an appeal might be moot after further jurisdictional discovery; and (2) no substantial difference of opinion existed as to the effect of the second clause of Section 12 of the Clayton Act. Resp. App. 24a. In an opinion dated August 3, 2004, the First Circuit declined without analysis to accept the interlocutory appeal. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

Petitioners must fail in their request for review of the lower court's bare denial of their application for permission to file an interlocutory appeal, a decision committed to that court's complete discretion. Moreover, even if this Court were to consider whether the Circuit Court erred by denying permission for interlocutory appeal, it should conclude that the jurisdictional arguments proffered by Petitioners implicate no substantial difference of controlling law. Finally, if this Court were to depart from its historic practices to consider the merits of an argument never considered by the Court of Appeals, it should conclude that the District Court correctly construed section 12 of the Clayton Act.

I. THE PETITION CHALLENGES A RULING AS TO WHICH THE COURT OF APPEALS HAS ABSOLUTE DISCRETION

Petitioners' brief is virtually silent as to a defect that fatally undermines the argument they urge the Court take up in this appeal. Petitioners appeal not from an interlocutory decision of the First Circuit Court of Appeal regarding jurisdiction under the Clayton Act, but from an order in which the lower court simply declined, in the exercise of its discretion, to consider the merits of their arguments at this early stage in the proceedings. Because the Circuit Court never reached the merits of Petitioners' jurisdictional arguments, this Court

should decline to review them upon this Petition for Writ of Certiorari.[2]

Both the text of 28 U.S.C. §1292 (b), relating to interlocutory review of district court orders, and courts interpreting this provision leave no doubt that appellate review of the merits of an order certified under this statute occurs only after the Circuit Court grants an application for such review:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, *in its discretion*, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . .

28 U.S.C. §1292 (b) (emphasis added).[3] The Courts of Appeals are granted absolute discretion to accept or reject appeal

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[2] Indeed, if this Court were to reverse the First Circuit's ruling, it could only command that court to accept the certified order for review on the merits. *Southern R. Co. v. King*, 217 U.S. 524 (1910) (noting that when a constitutional question is not made or passed upon in the lower court, the court of review will not consider it). This is plainly not the remedy sought by Petitioners, who exhort this Court to "provide the lower courts with much-needed guidance over an important and recurring question of federal antitrust law." Pet. Brief at 7.

[3] *See also Coopers & Lybrand v Livesay*, 437 U.S. 463, 474-75 (1978) (criticized in *McCormack v Amsouth Bank, N.A.*, 759 So. 2d 538, 540 (Ala. 1999) and superseded by statute on other grounds as stated *in Rivera v Veterans Mem. Med. Ctr.* 262 Conn. 730, 736 n.8 (Conn. 2003)); *Kraus v. Board of County Comm'rs*, 364 F.2d 919, 921 (6th Cir. 1966) (observing that the grant of interlocutory "appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the

under 28 U.S.C. §1292(b). *Kraus*, 364 F.2d at 921; *Gialde v Time, Inc.* 480 F.2d 1295 (8th Cir. 1973).

The federal Courts of Appeals rigorously observe the distinction between their gatekeeping function in deciding applications for permission to file an interlocutory appeal and their consideration of the merits of such appeals. The Second Circuit notes that "[w]e have previously held when considering an appellate court's grant of leave to appeal under 28 U.S.C. §1292 (b) that a motions panel's grant of such leave is provisional since the merits panel that hears the certified appeal is free to review that subject again." *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999) (internal quotations and citation omitted); *see also In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1368 (6th Cir. 1978) (noting that merits are considered only after permission for interlocutory review is granted); *Armco Steel Corp. v. United States*, 490 F.2d 688, 690 (8th Cir. 1974) (same); *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1249 (7th Cir. 1972) (same).

Indeed, the discretion accorded Circuit Courts in determining whether to grant such applications is so great that Congress has ensured that orders denying application for review under Section 1292(b) need contain no analysis or statement of reasons:

> It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. It could be based upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained

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same manner that the Supreme Court today refuses to entertain applications for writs of certiorari").

> for too long a period of time. But whatever the reason, *the ultimate determination* concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.

House Report No. 1667, 85 Cong.2d Sess., pp. 1, 2 (cited in *Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 434 (3d Cir. 1958) (emphasis added). Indeed, because a request for appellate interlocutory review may be denied merely because a court's docket is too voluminous, there may be no analysis of the merits for the court to offer in any event.

Because the First Circuit, consistently with the guidance of Congress, was silent in its order as to the reasons for its denial of Petitioners' request for interlocutory appeal, this Court cannot ascertain whether the lower court's denial of permission to appeal rested on any constitutional ground at all. This Court assiduously avoids review on such an ambiguous record. *Simmons v. West Haven Housing Authority*, 399 U.S. 510, 511 (1970) ("Because of an ambiguity in the record concerning the underlying reason these appellants were denied an opportunity to appeal the trial court's judgment ordering that they be evicted, we now conclude that this appeal should be dismissed."); *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 127 (1981) (declining to address constitutional issues posed in a petition for writ of certiorari in a case where the record contained ambiguities and the case was going back for further proceedings in the trial court).

This reticence is especially apt where, as here, further development of the factual record below may render any appeal moot. The District Court explicitly deferred ruling on Mercedes Canada's motion to dismiss pending the results of jurisdictional discovery. In the absence of such discovery and of any final disposition of Mercedes Canada's motion, it is impossible to determine on this undeveloped record whether the certified order in fact implicates a controlling question of

law. Depending on the results of the discovery, the District Court may grant Mercedes Canada's motion to dismiss on jurisdictional grounds, in which case its appeal of the certified order would be moot.

Alternatively, jurisdictional discovery may produce evidence suggesting that Mercedes Canada had sufficient contacts with a relevant state to justify personal jurisdiction without resorting to the District Court's interpretation of the venue and service provisions of Section 12 of the Clayton Act. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294 (1981) (declining to pass on the constitutionality of a statute in the absence of "an actual factual setting that makes such a decision necessary"); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 213 (1934) (holding that "[w]e are in accord with the view that it is inexpedient to determine grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues).[4]

II. THIS CASE IS NOT RIPE FOR REVIEW

Even if the First Circuit had issued an order on the merits of the jurisdictional question rather than a denial of permission to appeal, certiorari would be inappropriate for such an interlocutory decision. "[T]his court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the

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[4] Accordingly, even if the jurisdictional issue Petitioners raise were a "pure question of law" (Pet. Brief at 29), the necessity of reaching this question would be a question of fact that can be resolved only through further discovery.

writ is not issued until final decree."); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari, holding "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring in the denial of certiorari, and noting that the Court will "generally await final judgment in the lower courts before exercising our certiorari jurisdiction").[5]

Petitioners cannot point to any "extraordinary inconvenience or embarrassment" justifying departure from this Court's long-standing hesitance to review interlocutory decisions. Because the District Court explicitly deferred ruling on the jurisdictional motion of Mercedes Canada pending further discovery, resolution of the jurisdictional question might result in no savings to Petitioners. The results of the ongoing jurisdictional discovery may permit the District Court to exercise personal jurisdiction over Mercedes Canada without resorting to the national contacts analysis contested by Petitioners in their brief.

III. THE CIRCUIT COURT DID NOT ERR IN DENYING PERMISSION FOR INTERLOCUTORY APPEAL

Even if this Court were to consider the propriety of the Circuit Court's discretionary denial of Petitioners' request for permission to file an interlocutory appeal, it should conclude that the Circuit Court did not err. In order to pursue their interlocutory appeal, Petitioners were required to demonstrate

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[5] Petitioners' citation at pages 27-28 of their Petition to cases in which Circuit Courts have taken up their jurisdictional concerns on interlocutory appeal are inapposite, in that they implicate a standard distinct from that by which this Court grants a Petition for Writ of Certiorari. *See* 28 U.S.C. §1292 (setting out standard for interlocutory appeals); U.S. Sup. Ct. R. 10 (setting out standard for granting petitions for writ of certiorari).

to the Circuit Court that the order sought to be reviewed: (a) "involves a controlling question of law as to which" (b) "there is substantial ground for difference of opinion," and (c) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. §1292 (b); *In re Ulpiano Unanue Casal*, 998 F.2d 28, 32 (1st Cir. 1993). As the parties urging the appeal, Petitioners had the burden of satisfying all three factors. *Coopers*, 437 U.S. at 474-75. Petitioners' failures to satisfy each of these criteria provided independent bases for the Circuit Court's denial of their application for permission to file an interlocutory appeal.

A. Petitioners Failed to Demonstrate that the Certified Order Contained a "Controlling Question of Law" whose Resolution Would "Materially Advance" this Litigation

The fact that the certified order itself was not even final doomed Petitioners' attempt to demonstrate a controlling question of law. There is substantial overlap in the appeals court's analysis of whether the certified order involves a controlling question of law and whether the resolution of this question would materially advance the litigation. *In re Bank of New England Corp.*, 218 B.R. 643, 654 n.21 (1st Cir. 1998) (The element of materially advancing the litigation "overlaps the 'controlling question of law' factor, in that both are directed toward assuring that interlocutory review will advance the resolution of the underlying action."). If the contours of a case will be essentially the same in terms of the scope of discovery or the length and complexity of the trial, appeal should not be permitted. *Bank of New York v. Hoyt*, 108 F.R.D. 184, 189 (D.R.I. 1985); *Ashmore v. Northeast Petroleum*, 855 F. Supp. 438, 440 (D. Me. 1994).

As discussed above, the District Court explicitly deferred ruling on Mercedes Canada's motion pending jurisdictional discovery. Section 1292(b) does not permit the appeal of

decisions whose finality turns on further development of the factual record. *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 406 (8th Cir. 1979) (holding that "[t]he purpose of section 1292(b) is not to offer advisory opinions 'rendered on hypotheses which (evaporate) in the light of full factual development'") (citation omitted). Accordingly, this Court should decline to consider arguments that may be rendered moot.

B. There is No Substantial Difference of Opinion Regarding the District Court's Jurisdictional Rulings

While petitions for writ of certiorari may be granted when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," U.S. Sup. Ct. Rule 10(a), a higher standard must be met to demonstrate a "substantial ground for difference of opinion" for the purposes of interlocutory appeal. In meeting this standard, "[n]either disagreement outside the Circuit, nor the mere presence of a disputed issue that is a question of first impression in this Circuit demonstrate a substantial ground for a difference of opinion." *In re MTBE Prods. Liab. Litig.*, 174 F. Supp. 2d 4, 8 (S.D.N.Y. 2001) (noting that "section 1292(b) is not intended to be a 'vehicle to provide early review of difficult rulings in hard cases'") (citations omitted). Indeed, so long as the District Court's "conclusion is supported by other court . . . there is no substantial difference of opinion warranting an 'exception to the general policy against piecemeal appellate review embodied in the final judgment rule.'" *Id.* (citation omitted)

Because the District Court's well-founded reading of Section 12 of the Clayton Act is supported by the decisions of multiple Circuit Courts of Appeals, Petitioners were unable to demonstrate a substantial difference of opinion to the court below. In its March 4, 2004 Order, the District Court found,

consistent with the Ninth and Third Circuits, that "the second, worldwide service, clause of section 12 is available in anti-trust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute [§1391(b)]." Pet. App. 6a (citing *Go-Video, Inc. v. Akai Elec. Co. Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989)); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 292-93 (3d Cir. 2004). Because the District Court's opinion is thus supported not only by "other courts," but also by a majority of Circuit Courts to have considered this issue, there can be no substantial dispute about its conclusions for the purposes of interlocutory appeal. *MBTE*, 174 F. Supp. 2d at 8.

IV. THE DISTRICT COURT DID NOT ERR IN ITS INTERPRETATION OF SECTION 12 OF THE CLAYTON ACT

If this Court were to depart radically from its past practices to consider an issue never before the Court below, it should conclude that the District Court properly interpreted Section 12 of the Clayton Act. In its order denying defendants' motion to dismiss, the District Court essentially adopted the holding of the Third Circuit in *Auto. Refinishing*, 358 F.3d 288 (3rd Cir. 2004). Pet. App. 6a. In *Auto Refinishing*, the court correctly concluded that the usual rules of syntax weigh in favor of construing Section 12 as providing separate rules for service of process and venue. 358 F.3d at 295. Moreover, such a reading of the statute comports with "the basic, historic difference between these discrete concepts and what is required for their satisfaction." *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1179-80 (9th Cir. 2004).

In light of this construction, plaintiffs can properly rely on both the Alien Venue Statute and on the second clause of 15 U.S.C. §22 to establish a court's personal jurisdiction over a defendant based on a minimum contacts analysis considering

their contacts with the United States as a whole. *Auto Refinishing*, 358 F.3d at 293. Accordingly, Petitioners' request for issuance of a writ should be denied.

CONCLUSION

This Court should reject Petitioners' request for review of the First Circuit's discretionary refusal to accept their interlocutory appeal, a decision lying in that court's complete discretion. Even if this Court were to review this discretionary denial, it should conclude that the court below did not err and deny the instant petition for writ of certiorari.

Respectfully submitted.

JOSEPH J. TABACCO, JR.
BERMAN DEVALERIO PEASE
TABACCO BURT & PUCILLO
425 California Street,
Suite 2100
San Francisco CA 94104
(415) 433-3200

J. DOUGLAS RICHARDS
Counsel of Record
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
49th Floor
New York, NY 10119
(212) 594-5300

Counsel for Respondents George Jaynes, et al.

February 2, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.__

IN RE NEW MOTOR VEHICLES CANADIAN
EXPORT ANTITRUST LITIGATION

GEORGE C. JAYNES, *et al.*

Plaintiffs, Appellees,

v.

DAIMLERCHRYSLER CANADA INC. and
MERCEDES-BENZ CANADA INC.,

Defendants, Appellants

DEFENDANT DAIMLERCHRYSLER CANADA INC.
AND MERCEDES-BENZ CANADA INC.'S
PETITION FOR PERMISSION TO APPEAL
AN INTERLOCUTORY ORDER OF THE
DISTRICT COURT FOR THE DISTRICT OF MAINE

NOW COME the Defendants DaimlerChrysler Canada Inc. ("DC Canada") and Mercedes-Benz Canada Inc. ("MB Canada" and collectively "Appellants") and, pursuant to Fed. R. App. P. 5 and 28 U.S.C. § 1292(b), request permission to appeal an interlocutory ruling and in support thereof state as follows:

INTRODUCTION

Appellants seek to appeal the decision of the District Court of Maine holding that DC Canada was subject to the personal jurisdiction of that Court and deferring its decision on MB

Canada's motion to dismiss pending jurisdictional discovery. The Order was based on at least two distinct controlling issues of law and were this Court to overrule the District Court it would terminate the action as to the Appellants.

Moreover, there is a substantial ground for a difference of opinion as to both of these issues. As an initial matter, the Court incorrectly held that Plaintiffs could establish personal jurisdiction over DC Canada and MB Canada, by virtue of Section 12 of the Clayton Act without first establishing venue under this statute. Recognizing that the First Circuit has not addressed this issue and that other circuits have reached conflicting and contrary results, the Court certified this Order for interlocutory appeal based on this question.

Additionally, the District Court's finding that sufficient "minimum contacts" could be established under a novel jurisdictional theory is potentially inconsistent with established precedent and has been rejected by multiple state court judges presiding over the state counterparts to this action. While this was not the basis of the District Court's decision to certify the Order, this issue is also now within the jurisdiction of this Court.

In light of these issues which are of critical import to this action and this Circuit at large, Appellants respectfully request that this Court grant permission to appeal the Order so that these issues may be resolved prior to the continued litigation of this action.

FACTS NECESSARY TO UNDERSTAND THE QUESTION PRESENTED

Plaintiffs, who purport to represent consumers located throughout the U.S.,[1] allege that beginning in January 2001,

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[1] Plaintiffs filed lawsuits in a number of jurisdictions, which were then consolidated by the Judicial Panel on Multidistrict Litigation before the Honorable D. Brock Hornby.

various automotive companies headquartered in Germany, Japan, Canada and the United States, as well as two trade associations located in Canada and Virginia, entered into an amorphous and multi-tiered "series of agreements" designed to prevent the export of new cars sold in Canada into the United States. (First Amended Consolidated Complaint at ¶¶ 1-6 ("Compl.")).[2] As a result of the alleged series of agreements, Plaintiffs aver that the wholesale price of new cars to authorized United States dealers increased. (Compl. If 51). In turn, Plaintiffs allege that the price of new cars to consumers located in the United States, who purchased or leased from authorized dealers, was also higher. (Compl. ¶¶ 2, 51). As part and parcel of this alleged conspiracy, Plaintiffs appear to contend that Canadian Defendants, including DC Canada and MB Canada, presumably "sought and obtained" certain agreements from their respective Canadian dealers to discourage the retail export of Canadian vehicles to the United States. (Compl. ¶¶ 3(a), 4).

The Amended Consolidated Complaint contains no jurisdictional allegations specific to the Appellants, or for any Canadian Defendant for that matter. The complete absence of such basic jurisdictional allegations is not an oversight. The evidence before the trial court established that DC Canada (a Canadian corporation based in Toronto, Ontario) does not market, sell, or distribute new vehicles outside the borders of Canada. (Affidavit of Garnet Fenn ("Fenn Aff.")).[3] While DCMC, DC Canada's indirect parent company, purchases

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[2] For the convenience of the Court should it wish to check the cited references, and in light of the fact that the District Court record is still in the District Court, a copy of the first Amended Consolidated Complaint is attached hereto as Exhibit A.

[3] For the convenience of the Court, the Affidavit of Garnet Fenn and the Affidavit of David Leigh, which were before the District Court and remain in the District Court and which are cited herein, are attached as Exhibits B and C, respectively.

new vehicles from DC Canada, those sales are made in Canada, and DCMC is the sole importer of record for those vehicles. (Fenn Aff. ¶ 8).

Similarly, MB Canada has never sold or distributed new vehicles anywhere in the United States. *See* attached Affidavit of David Leigh ("Leigh Aff.") at ¶ 7. Rather, Mercedes-Benz USA, LLC, MB Canada 's sister company, at all times relevant to this lawsuit, held the exclusive right to market, advertise, and distribute at wholesale to dealers, Mercedes-Benz vehicles in the United States.

On March 4, 2004, the District Court denied DC Canada's motion to dismiss for lack of personal jurisdiction and deferred MB Canada's motion pending jurisdictional discovery. Appellants moved to amend the Order to certify for interlocutory appellate review by this Court. On April 20, 2004, the District Court granted in part Appellants' motion and certified the Order for interlocutory appeal.[4] Specifically, the Court found that its conclusion that "Clayton Act § 12 permits worldwide service of process upon alien corporate defendants in antitrust cases" was a controlling issue of law upon which there was a substantial ground for a difference of opinion and that an interlocutory appeal may materially advance the termination of the litigation as to the Appellants. Appellants now bring this Petition for permission to appeal to this Court.

QUESTIONS PRESENTED

1. Can Plaintiffs establish jurisdiction over the Appellants by virtue of Section 12 of the Clayton Act without first establishing venue under this statute?

2. Can jurisdiction over Appellants be established under a novel theory of minimum contacts based on (a) the transfer of

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[4] As required under Fed. R. App. P. 5(b)(1)(E), a copy of the order on the motions to dismiss and a copy of the order certifying that order for interlocutory appeal are attached as Exhibits D and E, respectively.

cars in Canada for ultimate shipment into the United States by a sister or parent corporation when those cars were unrelated to Plaintiffs' alleged injury and (b) entry into non-export agreements solely in Canada?[5]

REASONS WHY THE APPEAL SHOULD BE ALLOWED AND IS AUTHORIZED BY A STATUTE OR RULE

The Court of Appeals may, in its discretion, permit an appeal to be taken from an interlocutory order when a district court has certified that the order (1) involves a controlling question of law; (2) an immediate appeal would materially advance the ultimate termination of the litigation; and (3) there exists substantial ground for difference of opinion with respect to rulings set forth in the order. *Donatelli v. National Hockey League*, 893 F.2d 459, 461 (1st Cir. 1990) (Court of Appeals reviews order finding the existence of personal jurisdiction on interlocutory appeal); 28 U.S.C. 1292(b). The District Court has certified that the Order meets this standard, therefore, Appellants respectfully request that the Court permit an appeal of the Order.

I. The Question of Law at Issue is Controlling

"[I]t is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (citing J. Moore & B. Ward, 9 Moore's Federal Practice If 110.22(2), at 268 (1990)). Moreover, "an order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter." *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996). For this reason, courts have "granted certification

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[5] As discussed more fully below, although the District Court only certified a single issue for interlocutory appeal, if it accepts the appeal, this Court will have jurisdiction over all issues in the Order.

when the order involved issues of in *personam* and subject matter jurisdiction." *Klinghoffer*, 921 F.2d at 24; *see also Donatelli*, 893 F.2d 459 (interlocutory review of district ruling denying motion to dismiss for lack of personal jurisdiction).

Reversal of either of two bases for jurisdiction addressed by this Petition would lead to dismissal of this cause of action against the Appellants.

Accordingly, the issues raised by this Petition contain "controlling questions" under 1292(b). *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004) (reviewing interlocutory appeal based on correct interpretation of Clayton Act § 12); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987) (granting leave to appeal and reversing decision by district court finding personal jurisdiction based on out-of-forum transfers to an in-forum distributor).

II. An Interlocutory Appeal would Materially Advance the Ultimate Termination of the Litigation

"The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 830 F. Supp. 1549 (D. N.J. 1993) (citing 16 C. Wright, A. Miller, E. Cooper, E. Gressman, Federal Practice & Procedure § 3930, at 163 (1977)). *Max Daetwyler Corp. v. Meyer* is instructive on this issue. 575 F. Supp. 280 (E.D. Pa. 1983). There, the court found that an interlocutory appeal of a personal jurisdiction ruling would materially advance the ultimate termination of the litigation where the "Court of Appeals would presumably direct dismissal of the suit if it disagreed with my analysis of jurisdiction" and thus avoid "extensive discovery, employment of expert witnesses, and investigation of numerous complex legal issues." *Id.* at 282

(permitting appeal of certified order regarding use of national contacts analysis).[6] Likewise, in this instance, a reversal by this Court would, in fact, terminate this litigation as to these parties and save these parties from the burdensome expense of what could be a lengthy and complicated litigation. As the District Court found, this finding is sufficient to satisfy the requirements of 28 § 1292(b).

Moreover, the District Court noted that allowing an appeal would not result in any material delay to on-going proceedings or otherwise impede the progress of the underlying case as Appellants have agreed to accept any rulings litigated in this matter while this issue is on appeal. Therefore, Plaintiffs are free to pursue litigation fully against remaining defendants, including DC Canada's parent entities and MB Canada's sister corporation.

III. There is a Substantial Ground for Difference of Opinion on Each of the Bases Supporting the Court's Jurisdictional Finding

In finding that DC Canada was subject to personal jurisdiction, the District Court made at least two significant rulings. The basis for both of these rulings is subject to a substantial ground for difference of opinion.[7]

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[6] If Defendants were required to litigate this matter to a final judgment prior to having the opportunity to appeal and the First Circuit at that time determined that this Court's ruling was constitutionally infirm, Defendants would be left with no remedy for the considerable costs of litigating an action they rightfully should never have been a part of. *See*, e.g., *Max Daetwyler Corp.*, 575 F. Supp. at 282-83 (finding any concern over delay or potential for multiple appeals was outweighed by cost of permitting matter to proceed to trial only to have case later dismissed by Court of Appeals on jurisdictional grounds).

[7] Commentators have suggested that "the level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case. If proceedings that threaten to endure for several years depend on an initial

A. There is a Split Amongst the Circuits as to the Interpretation of Section 12 of the Clayton Act

The District Court correctly held that there is substantial ground for difference of opinion in regard to its holding that "the second, worldwide service clause of Section 12 [of the Clayton Act] is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute." Order at 5. Section 12 of the Clayton Act provides that:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 12 (1997). As the District Court noted, courts have struggled with the meaning of "in such cases" in the second clause of this section. Order at 4. Indeed, the District Court pondered whether "'such cases' mean antitrust lawsuits against a corporate defendant? Or does it mean only antitrust cases against a corporate defendant that meet all the criteria of the first clause, i.e., where venue is established on the criteria set forth there?" *Id.*

As the District Court also recognized "[u]ntil last month, there was an even split of the other Circuits," and the "First Circuit has not spoken on the issue." Order at 4. The District Court adopted the position of the Third Circuit and the Ninth Circuit, which found that "such cases" meant only "antitrust cases against a corporate defendant." However, ample author-

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question of jurisdiction . . . certification may be justified at a relatively low threshold of doubt." 16 Fed. Prac. & Proc. Juris.2d § 3930 (citing *Brown v. Texas & Pacific Railroad Co.*, 392 F. Supp. 1120, 1125 (W.D. La. 1975) and *Atlantic City Elec. Co. v. General Elec. Co.*, 207 F. Supp. 613, 620 (S.D.N.Y. 1962)).

ity may also be cited for the reverse proposition, i.e., that "such cases" means cases where venue has been properly established. *See GTE New Media Services, Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1350-51 (D.C. Cir. 2000) (finding that national service under Section 12 is available only in "such cases" where plaintiffs first establish venue under that statute); *see also Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), rev'd on other grounds, 369 U.S. 463 (1962); *Management Insights, Inc. v. CIC Enterprises, Inc.*, 194 F. Supp. 2d 520, 532 (N.D. Tex. 2001).[8]

Indeed, the existence of this split between the circuits presumably led the Third Circuit to review this precise issue on interlocutory appeal as well. *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004). It was for these reasons that the District Court correctly found that there was a substantial ground for difference of opinion as to the scope of Section 12 of the Clayton Act.[9]

B. Because Jurisdictional Principles Enunciated by the Supreme Court and First Circuit Conflict with the District Court's Subsidiary Jurisdictional Findings, An Additional Issue Presents Substantial Ground for Difference of Opinion

Although the District Court opted to base its certification of the Order on only one of the issues presented in Appel-

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[8] To determine the appropriateness of interlocutory review at this stage, this Court need only determine that a "substantial ground for difference of opinion" exists; the Court need not find that reversal on this issue is likely. *Brown v. Texas & Pac. Railroad Co.*, 392 F. Supp. 1120, 1125 (W.D. La. 1975).

[9] This decision is also 'supported by the decisions of the Eastern District of Pennsylvania and the Third Circuit Court of Appeals in *Max Daetwyler Corp.* to respectively certify and permit an appeal of the similar question of whether the court properly used a "national contacts" analysis to evaluate personal jurisdiction in a federal question suit against an alien defendant. 575 F.Supp. at 283 (certifying appeal where decision was based on choice between conflicting authority); *Max Daetwyler Corp.*, 762 F.2d 290 (permitting appeal).

lants' motion to certify, this Court is still permitted to review any issue presented in the Order. *Yamaha Motor Corp., U.S.A., et al v. Calhoun*, 516 U.S. 199, 205 (1996). Indeed the Supreme Court has specifically held that an "appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (citing 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 110.25[1], p. 300 (2d ed.1995)). Therefore, Appellants submit an additional controlling question which is also the subject of a substantial ground for a difference of opinion and would also be the subject of an appeal to this Court.

The District Court appeared to recognize that traditional theories of specific jurisdiction do not apply to Appellants. Thus, the court held that the allegation that is the "focus of the complaint"—that vehicles sold by Canadian dealers were prevented from leaving Canada—does not support personal jurisdiction over the Canadian defendants. Order at 22. Nor do the activities of U.S. corporations related to the Canadian defendants support personal jurisdiction. Order at 16, n. 6. And finally, the District Court appears to acknowledge that the traditional "stream of commerce" theory, which requires more than the mere manufacture of a product that finds its way to the United States, does not apply. Instead, the court extended the stream of commerce doctrine to circumstances where (a) some products are manufactured and title is transferred outside the United States, (b) those products are then imported by, and distributed under the control of a corporate relative, and (c) other products are withheld from the United States:

> "In most cases, personal jurisdiction attaches because items are put directly into forums' stream of commerce. In this case, the focus of the complaint is that items are withheld. Although companies can withhold items to avoid being subject to jurisdiction, cf. Burger king etc., withholding some while sending others may constitute

> activity directed toward a forum that is sufficient to sustain specific jurisdiction."

Order at 17, n.8. Appellants acknowledge that they transfer some products in Canada that find their way into the United States. Because Appellants have no ability to direct those products to the United States, and because Plaintiffs' alleged injuries do not arise from those products, the requirements of the stream of commerce test are not met. The novel theory of the District Court appears to hold that personal jurisdiction may nevertheless attach where there is a combination of contacts, no one of which would be constitutionally sufficient. [10]

The District Court's novel articulation of this stream of commerce theory is constitutionally deficient. Under First Circuit law, "[t]he relatedness requirement is not met merely because a plaintiff's cause of action arose out of the general relationship between the parties; rather, the action must directly arise out of the specific contacts between the defendant and the forum state." *Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995) (emphasis added); *US. v. Swiss American Bank, Ltd.*, 274 F.3d 610, 622 (1st Cir. 2001) (defendant's in-forum contact must cause the injury or give rise to the cause of action). As Plaintiffs' claim bears no, or at best, only an ancillary relationship to DC Canada's sole jurisdictional contact, jurisdiction cannot lie.

The stream of commerce theory most typically arises in products liability situations where a foreign manufacturer, with no direct connection with the forum itself, negligently manufactures a product that later causes bodily injury to a

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[10] Moreover, MB Canada transfers such vehicles only sporadically. (Leigh Aff. ¶ 9). Such sporadic transfers do not constitute "purposeful availment" under any scenario as "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 117 (1987).

consumer in a distant forum. Because the forum contacts by the manufacturer are already highly attenuated in these types of situations, the product itself and the act of placing that product in the distribution chain are not merely connected in some fashion to the plaintiff's cause of action—they form the basis of the plaintiffs' cause of action in the first instance. Indeed, as stated in World-Wide Volkswagen, the product itself is the "source of injury to its owner or to others." 444 U.S. 286, 297 (1980) (emphasis added).

Plaintiffs here cannot, and do not, contend that the vehicles DC Canada transferred in Canada constitute the "source" of their injuries. Rather, as found by the Minnesota Court in Lerfald, *infra*, Plaintiffs complain solely about the vehicles DC Canada did not transfer. (Compl. ¶ 1). Indeed, as evidenced by the claims against other Canadian defendants who did not transfer vehicles to related U.S. entities, Plaintiffs still would have suffered their alleged injuries whether or not DC Canada manufactured or transferred vehicles in Canada. *See Swiss American Bank*, 274 F.3d at 622 (contact deemed unrelated where it is not essential to plaintiff's claim). Rather than bear any relation to the Plaintiffs' claims, if anything, the fact that DC Canada transferred vehicles for ultimate resale into the U.S. would negate Plaintiffs' injury, which resulted because of fewer, not more, vehicles in the U.S.

Moreover, unlike plaintiffs in products liability actions, Plaintiffs here do not claim there was something inherently defective or dangerous about DC Canada's vehicles when they left Defendants' control. Rather, Plaintiffs complain that the price of all vehicles—regardless of their point of origin—were inflated at the retail level. (Compl. IT 1, 51). By definition, the retail price was set long after the vehicle left DC Canada's facilities, nor is there any allegation that DC Canada charged an inflated transfer price to its indirect parent. Thus, unlike the typical products liability action where the

product is defective at all times throughout the chain of distribution, the alleged higher "price" could not and did not travel in the stream of commerce. Accordingly, because Plaintiffs' claim is that "defendants rigged a scheme to inflate [the product's] price," not that "there was anything defective" about the way in which DC Canada's vehicles were manufactured, stream of commerce jurisdiction cannot be invoked. *In re Lupron Mktg. and Sales Practices Litigation*, 245 F.Supp.2d 280, 301 (D. Mass. 2003).

Given the lack of direct relationship between DC Canada's forum "contact" and Plaintiffs' cause of action, the District Court appeared to recognize that stream of commerce theory, as traditionally applied, was not applicable here. Instead, the District Court formulated a novel theory of relatedness based on the fact that "evidence of targeted distribution and non-export agreements . . . ensure that only the higher priced version of the same product can be sold to American consumers." Order at 19. The District Court's attempt to articulate some link between DC Canada's placement of vehicles into a stream of commerce to Plaintiffs' alleged injury however, does not meet the *Sawtelle* Court's requirement that the alleged injury arise *directly* from a defendant's jurisdictional contact.

First, the District Court 's use of non-export agreements to connect Plaintiffs' injury with DC Canada's jurisdictional contact only confirms that Plaintiffs' injury, to the extent it arose directly from any alleged conduct of DC Canada, arose out of those agreements rather than from the fact it placed vehicles in the stream of commerce. In this regard, the District Court rightly acknowledged that such non-export agreements are not constitutionally cognizable "contacts" for jurisdictional purposes; instead, the District Court correctly noted that a manufacturer is entitled to place limits on its distribution so as to avoid jurisdiction. Order at 22. As. applied to DC Canada, however, the District Court offered no explanation as

to how an allegation of *preventing* products from entering the U.S. can possibly be the apparent keystone of a novel species of the stream of commerce doctrine.

Likewise, the District Court's emphasis on the fact that Plaintiffs' purchased a "higher priced version" of vehicle also confirms the lack of any direct nexus between DC Canada's jurisdictional contact and Plaintiffs' alleged injury. DC Canada is not alleged to have sold its vehicles to its indirect parent at a supracompetitive price, which was in turn passed along to Plaintiffs. Thus, to the extent Plaintiffs' did pay an inflated price for their vehicles, it was as a direct result of the pricing actions of DC Canada's indirect parent. In that regard, the District Court correctly found that it would be improper to otherwise impute these actions of the indirect parent to DC Canada. Order at 16, n. 6. Here, too, the District Court failed to explain how such imputation would otherwise be proper in the context of its newly-articulated stream of commerce theory.

In sum, the District Court recognized (a) that DC Canada's transfer of vehicles to its indirect parent alone was insufficient to confer jurisdiction; (b) that acts in Canada to prevent cars sold in Canada from being resold in the U.S. were insufficient to support jurisdiction; and (c) that DC Canada could not be held to the acts, including necessarily, pricing actions, of its indirect parent. Thus, the District Court's articulation of its new stream of commerce theory appears to be constructed on the novel premise that these elements, when combined, are somehow greater than the sum of its parts. These factors, however, even when combined, are not equivalent to placement of products into the stream of U.S. commerce nor to any purposeful availment of the privilege of conducting activities in the United States, and cannot make the exercise of jurisdiction over DC Canada satisfy due process. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). Because the District Court 's treatment of this issue

differs in fundamental ways from the established jurisprudence of this Circuit and threatens to significantly expand the scope of stream of commerce jurisdiction, there is also a substantial ground for a difference of opinion on this issue. *See Donatelli*, 893 F.2d at 460 (1st Circuit allowing interlocutory appeal where court was "impressed by the issue's novelty and importance").

CONCLUSION

DC Canada and MB Canada respectfully request that this Court grant their request to appeal the District Court's Order.

Dated: May 4, 2004

/s/ WILLIAM J. KAYATTA, JR.

WILLIAM J. KAYATTA, JR.
CLIFFORD H. RUPRECHT
PIERCE ATWOOD
One Monument Square
Portland, ME 04101
Telephone: (207) 791-1100
Facsimile: (207) 791-1350
wkayatta(@pierceatwood. com
cruprecht@pierceatwood.com

and

STEVEN A. NEWBORN
JAMES C. EGAN, JR.
KIRSTEN LOCKHART
GEORGE J. HAZEL
WEIL, GOTSHAL & MANGES
1501 K Street N. W., Suite 100
Washington, DC 20005
Telephone: (202) 682-7000
Facsimile: (202) 857-0940

Counsel for Defendants DaimlerChrysler Canada Inc. and Mercedes-Benz Canada Inc.

CERTIFICATE OF SERVICE

I, William J. Kayatta, Jr., hereby certify that on May 4, 2004, I caused a copy of the Defendant DaimlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc.'s Petition for Permission to Appeal an Interlocutory Order of the District Court for The District of Maine, to be served via overnight mail on the following:

GLENN A. MITCHELL
STEIN, MITCHELL & MEZINES
1100 Conn. Ave., Suite 1100
Washington, DC 20036
Telephone: 202-737-7777
Facsimile: 202-296-8312

Counsel for Defendant National Automobile Dealers Association

DEBORAH A. GARZA
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
1001 Pennsylvania Ave., NW, Suite 800
Washington, DC 20004
Telephone: (202) 639-7270
Facsimile: 202-639-7003

Counsel for Defendant Canadian Automobile Dealers' Association

RICHARD C. GODFREY
DAVID J. ZOOT
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
Telephone: 312-861-2000
Facsimile: 312-861-2200

Counsel for Defendants General Motors Corporation and General Motors of Canada, Ltd.

ROBERT A. VAN NEST
KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco,
California 94111
Telephone: 415-391-5400
Facsimile: 415-397-7188

Counsel for Defendants American Honda Motor Company, Inc. and Honda Canada Inc.

MICHAEL R. LAZERWITZ
CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 Pennsylvania Ave., N.W.
Suite 9000
Washington, D.C. 20006
Telephone: 202-974-1500
Facsimile: 202-974-1999

Counsel for Defendants Toyota Motor Sales U.S.A., Inc. and Toyota Canada, Inc

DANIEL L. GOLDBERG
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
Telephone: 617-951-8000
Facsimile: 617-951-8736

Counsel for Defendants BMW of North America, LLC and BMW Canada Inc.

JOSEPH J. TABACCO, JR.
SHARON T. MAIER
BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO
425 California Street,
Suite 2100
San Francisco, CA 94104
Telephone: 415-433-3200
Facsimile: 415-433-6382

Plaintiffs' Chair

MARGARET M. ZWISLER
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: 202-783-0800
Facsimile: 202-383-6610

Counsel for Defendants Ford Motor Company and Ford Motor Company of Canada, Limited

PETER SULLIVAN
GIBSON DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213-229-7000
Facsimile: 213-229-7520

Counsel for Defendants Nissan North America, Inc. and Nissan Canada, Inc.

R. SCOTT PALMER
BERMAN DEVALERIO PEASE TABACCO BURT & PUCILLO
515 North Flagler Drive,
Suite 1701
West Palm Beach, FL 33401
Telephone: 561-835-9400
Facsimile: 561-835-0322

Plaintiffs' Chair

MICHAEL M. BUCHMAN
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
One Pennsylvania Plaza
New York, NY 10119
Telephone: 212-594-5300
Facsimile: (212) 868-1229

Plaintiffs' Vice Chair

ROBERT J. LAROCCA
WILLIAM E. HOESE
KOHN, SWIFT & GRAF, P.C.
One South Broad Street,
Suite 2100
Philadelphia, PA 19107
Telephone: 215-238-1700
Facsimile: 215-238-1968

Plaintiffs' Steering Committee

BERNARD PERSKY
HOLLIS L. SALZMAN
CHRIS MCDONALD
GOODKIND LABATON RUDOFF
& SUCHAROW LLP
100 Park Avenue
New York, NY 10017
Telephone: 212-907-0700
Facsimile: 212-818-0477

Plaintiffs' Steering Committee

H. ADAM PRUSSIN
DON DAVIS
POMERANTZ HAUDEK BLOCK
GROSSMAN & GROSS LLP
100 Park Avenue
New York, NY 10017
Telephone: 212-661-1100
Facsimile: 212-661-8665

Plaintiffs' Steering Committee

PATRICK E. CAFFERTY
JENNIFER WINTER SPRENGEL
MILLER FAUCHER AND
CAFFERTY LLP
30 North La Salle Street,
Suite 3200
Chicago, IL 60602
Telephone: 312-782-4880
Facsimile: 312-782-4485

Plaintiffs' Steering Committee

SAMUEL D. HEINS
ALAN I. GILBERT
HEINS MILLS & OLSON, P.L.C.
3550 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: 612-338-4605
Facsimile: 612-338-4692

Plaintiffs' Steering Committee

STEPHEN LOWEY
PETER ST. PHILLIP
LOWEY DANNENBERG
BEMPORAD &
SELINGER, P.C.
The Gateway
One North Lexington Avenue
White Plains, NY 10601
Telephone: 914-997-0500

Plaintiffs' Steering Committee

Further, Defendant DaimlerChrysler Canada, Inc. and Mercedes-Benz Canada, Inc.'s Petition for Permission to Appeal an Interlocutory Order of the District Court for The District of Maine was served via hand-delivery, with a courtesy copy via electronic mail to:

ROBERT S. FRANK, ESQUIRE
HARVEY & FRANK
Two City Center
4th Floor
Portland, Maine 04112-0126
Telephone: 207-775-1300
Facsimile: 207-775-5639
frank@harveyfrank.com

Plaintiffs' Liaison Counsel and Plaintiffs' Steering Committee

DATED: 05/04/04

/s/ William J. Kayatta, Jr.
WILLIAM J. KAYATTA, JR.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-8006

IN RE NEW MOTOR VEHICLES CANADIAN
EXPORT ANTITRUST LITIGATION

GEORGE C. JAYNES, ET AL.,
Plaintiffs-Respondents,

v.

DAIMLERCHRYSLER CANADA INC. AND
MERCEDES-BENZ CANADA INC.,
Defendants-Petitioners

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DAIMLER CHRYSLER CANADA, INC. AND MERCEDES-BENZ CANADA INC.'S PETITION FOR PERMISSION TO APPEAL AN INTERLOCUTORY ORDER OF THE DISTRICT COURT FOR THE DISTRICT OF MAINE

Pursuant to Federal Rule of Appellate Procedure 5 and 28 U.S.C. § 1292(b), Plaintiffs-Respondents submit this memorandum of points and authorities in opposition to Defendants-Petitioners DaimlerChrysler Canada, Inc. ("Daimler Canada") and Mercedes-Benz Canada, Inc.'s ("Mercedes Canada") Petition for Permission to Appeal an Interlocutory Order of the District Court for the District of Maine (the "Petition").

I. INTRODUCTION

In their Petition, Defendants-Petitioners seek to distract the Court from the weakness of their argument for interlocutory review by engaging in evidentiary disputes irrelevant to the question at hand. The critical question for this Court to determine whether or not to permit an appeal to proceed is whether the certified Order is final, concerns a controlling question of law whose resolution will materially advance the litigation, and involves legal conclusions about which there exists substantial debate. Because Defendants-Petitioners fail to meet this stringent standard, their Petition should be rejected.

As a preliminary matter, the Petition for interlocutory review is premature in that the certified Order makes no conclusive determination as to the rights or liabilities of Mercedes Canada. Indeed, the District Court explicitly deferred any ruling on the question of its jurisdiction over this Defendant. Until such a ruling, any interlocutory review of the District Court's conclusions with regard to Mercedes Canada is premature, as it potentially could be moot.

The certified Order does not involve any controlling question of law, in that it conclusively disposes of the jurisdictional issue as to only Daimler Canada, which is but one of the seventeen Defendants in this case. Even in the unlikely event that this Court reverses the District Court's jurisdictional determination as to this sole Defendant, such a ruling cannot possibly speed the termination of this litigation. Regardless of Daimler Canada's participation in this suit, virtually identical evidentiary and legal issues would remain to be litigated.

Similarly, the certified Order implicates no difference of legal opinion sufficient to permit an appeal to proceed. The District Court's careful opinion adopted the recent exhaustive analysis of the Third Circuit Court of Appeals on the issue of

jurisdiction under Section 12 of the Sherman Act. Because this analysis reflects the wisdom of the majority of circuit courts that have taken up this question, the certified Order involves no substantial difference in legal opinion.

Moreover, there is nothing novel about the District Court's use of the time-honored minimum contacts standard in determining its jurisdiction over Daimler Canada. Defendants-Petitioners' argument concerning whether the District Court properly considered some of their activities in making its determination amounts to simple second-guessing of the District Court's application of the appropriate legal standard. Such claims are not appropriate for the exceptional review afforded under Section 1292(b).

Finally, even if the Court were to permit an appeal of the March 4, 2004 Order to proceed, Plaintiffs-Respondents would then urge that the Court overturn the District Court's misguided refusal to find jurisdiction over all the Defendants on the basis of the conspiracy theory of jurisdiction. Because jurisdiction under such a theory is well accepted in New York—the venue of origin of one of the transferred cases—the District Court was obliged to find jurisdiction in the transferee venue.

II. PROCEDURAL HISTORY

In their First Amended and Consolidated Complaint ("FACC"), plaintiffs allege that Mercedes Canada, Daimler Canada, and other American and Canadian automobile manufacturers and trade associations conspired with United States and Canadian automobile dealers to prevent new motor vehicles purchased in Canada from entering the U.S. FACC at ¶¶ 1-6, 23-45. The FACC alleges that by means of this conspiracy, the named Defendants suppressed and restrained interbrand competition for new motor vehicles, maintained U.S. new motor vehicle prices at artificially high levels, and

restricted the supply and/or output of new motor vehicles in the U.S. FACC at ¶¶ 77.

In motions to dismiss dated October 31, 2004, Mercedes Canada and Daimler Canada moved to dismiss this case for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). In a 26-page Memorandum Decision and Order on Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, dated March 4, 2004 ("Mem. Dec."), the District Court denied Daimler Canada's motion and deferred ruling on Mercedes Canada's motion. Mem. Dec. at 2-3. The District Court concluded that "the second, worldwide service clause of Section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with an alien venue statute." Mem. Dec. at 5. The Court then observed that, with regard to Daimler Canada, the evidence showed that Daimler Canada dealers entered into non-export agreements with their consumers, that Daimler Canada sent a notice to dealers on both sides of the border that vehicle distribution outside the "dealer network" was prohibited, and that Daimler Canada would not provide warranty coverage for vehicles exported from Canada to the U.S. Mem. Dec. at 19. The District Court concluded that these activities met the standard for personal jurisdiction set out in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), and further determined that the gestalt factors set out in *Ticketmaster-New York v. Alioto*, 26 F.3d 201, 207 (1st Cir. 1994) aligned in support of jurisdiction over Daimler Canada. Mem. Dec. at 18-19.

As to Mercedes Canada, the District Court held that "I *defer* action on Mercedes-Benz Canada's 12(b)(2) motion to dismiss for lack of personal jurisdiction pending jurisdictional discovery on the scope of sales of Mercedes Benz-Canada vehicles into the American market (through Mercedes-Benz USA) and concerning the scope of the

Mercedes-Benz non-export agreements for Canadian vehicles." Mem. Dec. at 23-24.

III. QUESTIONS PRESENTED

1. Should this Court permit the appeal of an Order that finally determines jurisdiction over only one of seventeen named Defendants?

2. Should this Court permit the appeal of an Order that presents no controlling question of law and whose resolution will not materially advance the litigation of this case?

IV. REASONS WHY APPEAL SHOULD NOT BE PERMITTED

While a district court must make the threshold determination to certify an order for interlocutory appeal pursuant to 28 U.S.C. § 1292, this Court determines for itself whether it will permit an appeal pursuant to that provision. *Ultra-Precision Mfg. Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1358 (Fed. Cir. 2003); *see also Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 46 n.7 (1st Cir. 1988) (noting one aspect of the regimen set forth in Section 1292(b) is that "[T]he mechanism permits the Court of Appeals to protect its docket by determining for itself whether to accept the issue for review.") (citation, internal quotations omitted). This determination lies within this Court's discretion. *Ultra-Precision*, 338 F.3d at 1358. Even if the criteria for certification are present, a court may, in its discretion, deny certification. *Wm. Passalacqua Builders, Inc. v. Resnick Develop. South, Inc.*, 611 F. Supp. 281, 284 n.2 (S.D.N.Y. 1985).

Because Defendants-Petitioners are unable even to show that the certified Order is final, much less that it satisfies the controlling question and substantial debate requirements under Section 1292(b), their Petition for interlocutory appeal should be rejected.

A. The Certified Order is Not Final as to Mercedes Canada

The Petition is fatally defective because the Order that it seeks to appeal is not ripe for review. In *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 406 (8th Cir 1979), the Eighth Circuit Court of Appeals held:

> While it might be conceivable that an issue includes a controlling question of law, and while it might be seemingly apparent that it is a difficult question as to which there is a substantial ground for difference of opinion, and while a decision thereon might materially advance the ultimate outcome, the case must be of sufficient ripeness so that this can be determined from the record. The purpose of section 1292(b) is not to of fer advisory opinions "rendered on hypotheses which (evaporate) in the light of full factual development." Consideration of the factual basis must be such that a sound premise exists upon which the legal issues can be determined with precision.

(Citation omitted.)

The District Court explicitly deferred ruling on Mercedes Canada's motion to dismiss pending the results of jurisdictional discovery. In the absence of such discovery and of any final disposition of Mercedes Canada's motion, it is impossible to determine on this undeveloped record whether the certified Order in fact implicates a controlling question of law. Depending on the results of the discovery, the District Court may grant Mercedes Canada's motion, in which case its appeal of the certified Order would be moot. Alternatively, jurisdictional discovery may produce evidence that Mercedes Canada had sufficient contacts with a relevant state to justify personal jurisdiction without resorting to the District Court's interpretation of the venue and service provisions of Section 12 of the Clayton Act. Indeed, if the Court elected to permit Mercedes Canada to appeal, the only decision relating to

Mercedes Canada that would be capable of review is the District Court's determination that it would let jurisdictional discovery proceed, a conclusion reviewed only for abuse of discretion. *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 39 (1st Cir. 1992).

B. The Petition Fails to Satisfy the Requirements of Section 1292(b)

Even if the certified Order were ripe, Defendants-Petitioners have failed to satisfy any of the requirements for interlocutory appeal under Section 1292(b). In order to pursue an interlocutory appeal, Defendants-Petitioners must demonstrate to this Court that the order sought to be reviewed: (a) "involves a controlling question of law as to which" (b) "there is substantial ground for difference of opinion," and (c) "that an immediate appeal from the order may materially advance the ultimate tennination of the litigation." 28 U.S.C. § 1292(b); *In re Ulpiano Unanue Casal*, 998 F.2d 28, 32 (1st Cir. 1993). As the parties urging the appeal, Defendants-Petitioners have the burden of satisfying all three factors. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978). Defendants-Petitioners' failures to satisfy each of these factors provide independent bases for denying their Petition for review.

1. Defendants-Petitioners Have Not Demonstrated that the Certified Order Contains a "Controlling Question of Law" whose Resolution Would "Materially Advance" this Litigation

There is substantial overlap in this Court's analysis of whether the certified Order involves a controlling question of law and whether the resolution of this question would materially advance the litigation. *In re Bank of New England Corp.*, 218 B.R. 643, 654 n.21 (1st Cir. 1998) (The element of materially advancing the litigation "overlaps the 'controlling question of law' factor, in that both are directed toward

assuring that interlocutory review will advance the resolution of the underlying action."). Defendants-Petitioners must show that interlocutory review under Section 1292 could reverse a ruling that is "serious to the conduct of the litigation." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3rd Cir. 1974). If the contours of a case will be essentially the same in terms of the scope of discovery or the length and complexity of the trial, appeal should not be permitted. *Bank of New York v. Hoyt*, 108 F.R.D. 184, 189 (D.R.I. 1985); *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 855 F. Supp. 438, 440 (D. Me. 1994). While Defendants-Petitioners proffer two supposed controlling questions in their Petition, neither withstands analysis.

First, Defendants-Petitioners argue that the District Court's assertion of jurisdiction over Daimler Canada alone among seventeen Defendants presents a controlling question of law. As authority for this proposition, they cite, *inter alia*, *Donatelli v. Nat'l Hockey League*, 893 F.2d 459 (1st Cir. 1990), in which this Court was asked to review a District Court's order refusing to dismiss Donatelli's case against the National Hockey League ("NHL") for lack of jurisdiction. *Id.*. While the Court of Appeals permitted an interlocutory appeal in that instance, the NHL was the sole defendant in that case. *Id.* Unlike the motion in *Donatelli*, however, Daimler Canada's motion to dismiss in this case cannot result in the termination of this litigation. Instead, even if the District Court's Order were upheld, the case would proceed against the remain ing sixteen Defendants. Daimler Canada has not, and cannot, point to any diminution in the length of discovery or trial that might result from their dismissal from this case. Because the "basic contours" of this case would thus be unchanged as a result of an interlocutory appeal, the Petition must be denied. *Bank of New York*, 108 F.R.D. at 189.

Defendants-Petitioners similarly fail in their attempt to elicit a controlling question of law from the District Court's

determination that Daimler Canada's contacts with the U.S. were sufficient to establish in *personam* jurisdiction. The essence of Defendants-Petitioners' argument on this point is that the District Court improvidently based its jurisdictional findings on, among other things, the fact that Daimler Canada sent notices to dealers in the U.S. stating that Daimler would not provide warranty coverage for vehicles exported from Canada to the U.S. Petition at 6; Mem. Dec. at 19. Defendants-Petitioners' argument amounts to a disagreement with the Court over the manner of the District Court's application of the national contacts test, not on what law to apply. Such a dispute is not an appropriate subject for the extraordinary. measure of interlocutory review. *McGillicuddy v. Clements*, 746 F.2d 76, 77 n.l (1st Cir. 1984) (Interlocutory review is appropriate only "where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.").

Defendants-Petitioners' attempt to demonstrate a controlling question in the certified Order is further doomed for the reason that the Order itself is not even final. As discussed above at 4, the District Court explicitly deferred ruling on Daimler Canada's motion pending jurisdictional discovery. Mem. Dec. at 26. Section 1292(b) does not permit the appeal of decisions whose finality turns on further development of the factual record. *Paschall*, 605 F.2d at 406 (holding that "The purpose of section. 1292(b) is not to offer advisory opinions 'rendered on hypotheses which (evaporate) in the light of full factual development') (citation omitted).

2. There is No Substantial Difference of Legal Opinion on the Bases Underlying the District Court's Jurisdictional Rulings

Neither the District Court's well-founded reading of Section 12 of the Clayton Act nor its common-sense application of the personal jurisdiction test set out in *World-Wide Volkswagen* invoke any substantial difference of legal opin-

ion. Demonstration of a substantial difference of legal opinion requires satisfaction of a stringent standard: "[n]either disagreement outside the Circuit, nor the mere presence of a disputed issue that is a question of first impression in this Circuit demonstrate a substantial ground for difference of opinion" required for interlocutory appeal. *In re MTBE Products Liab. Litig.*, 174 F. Supp. 2d 4, 8 (S.D.N.Y. 2001) (noting that "[S]ection 1292(b) is not intended to be a 'vehicle to provide early review of difficult rulings in hard cases.'") (citation omitted). Indeed, so long as the District Court's "conclusion is supported by other courts . . . there is no substantial difference of opinion warranting an exception to the general policy against piecemeal appellate review embodied in the final judgment rule." *Id.* (internal quotations omitted). Because the District Court correctly adopted the most widely accepted reading of Section 12 of the Clayton Act, no substantial difference of opinion exists as to its determination of this issue. Furthermore, Defendants-Petitioners' quarrel with the District Court's application of the *World-Wide Volkswagen* test amounts to a disagreement over the result of the test's application to these facts, rather than which test should appropriately be applied.

a. Analysis of Section 12 of the Clayton Act

Although Defendants-Petitioners assert a split among the circuits as to the interpretation of Section 12 of the Clayton Act, the disagreement they point to is between an obsolescent minority view, on one hand, and the current, most widely accepted understanding of that section, on the other. In its March 4, 2004 Order, the District Court found, consistent with the Ninth and Third Circuits, that "the second, worldwide service, clause of Section 12 is available in antitrust cases generally against corporate defendants, and that a plaintiff can use it in conjunction with the alien venue statute [§1391(b)]." Mem. Dec. at 3-5 (citing *Go-Video, Inc. v. Akai Elec. Co. Ltd.* 885 F.2d 1406, 1413 (9th Cir. 1989)); *In re*

Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 292-93 (3rd Cir. 2004.) Because the District Court's opinion is thus supported not only by "other courts," but also by a majority of circuit courts to have considered this issue, there is no substantial dispute about its conclusions. *MBTE*, 174 F. Supp. 2d at 8.

While Defendants-Petitioners argue that the District Court's view is contrary to the position taken by the District of Columbia Circuit in *GTE New Media Servs. v. Bell South Corp*, 199 F.3d 1343, 1350 (D.C. Cir. 2000), that case adds little to their position. In *GTE*, the D.C. Circuit relied heavily on the Second Circuit's 40-year old decision in *Goldlawr Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), in determining that Section 12's venue requirement must be satisfied before its expansive jurisdictional provision may be invoked. *GTE*, 199 F.3d at 1351 (noting that "[W]e align ourselves with the position taken by the Second Circuit.") (citation omitted). However, the Second Circuit itself has cast doubt on the continuing vitality of this doctrine. Indeed, in addressing the interpretation of Section 12 in *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 207 (2d Cir. 2003), the Second Circuit makes no mention of *Goldlawr*. *Id.* Instead, it observes that the proper interpretation of Section 12 is in dispute, citing, *inter alia*, *Go-Video*, 885 F.2d at 1413, and *In re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26, 27 n.3, 30 (D.D.C. 2000) (questioning wisdom of D.C. Circuit's interpretation of Section 12 to require that a defendant be an inhabitant of, be found in, or transact business in a forum before being subject to worldwide service of process in a multidistrict, antitrust suit). This difference of opinion between a single, outlying circuit court and the majority of circuit courts who have taken up this issue is not a "substantial difference of opinion" that could warrant interlocutory review. *MBTE*, 174 F. Supp. 2d at 8.

b. The National Contacts Analysis

Defendants-Petitioners' search for a substantial difference of legal opinion in the District Court's national contacts analysis is similarly fruitless. Though Defendants-Petitioners disagree with the *results* of the Court's analysis, their Petition identifies no substantial difference of opinion regarding the authority relied upon by the District Court warranting interlocutory review.[1]

In determining whether it could exercise specific jurisdiction over all of the Canadian Defendants, the District Court set forth each step of its analysis, in accordance with prevailing authority. Mem. Dec. at 11-12. The District Court first considered whether Defendants' conduct was purposefully directed at the forum and whether the alleged injuries arise from that contact (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The District Court next discussed purposeful availment, voluntariness, foreseeability (*citing U.S. v. Swiss Am. Bank, Ltd.*, 274 F. 3d 610, 621 (1st Cir, 2001)), and reasonableness (*citing Asahi Metal Industry Co. v. Super. Ct.*, 480 U.S. 102, 113-16 (1987)). Defendants-Petitioners point to no differences of law concerning these authorities.

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[1] Defendants-Petitioners' citation to *Lerfald v. GM*, No. CT 03-003327 (Minn. Dist. Ct. Nov. 7, 2003), is inapposite. In *Lerfald*, the court determined whether Canadian defendants had sufficient contacts with *Minnesota* warranting the exercise of personal jurisdiction. Here, the Court must determine whether there are sufficient contacts with the U.S.—an analysis invoking a distinct standard. In any event, because a determination by the Minnesota court does not constitute controlling authority for the purposes of the District Court's analysis, *Lerfald* cannot give rise to a substantial difference of legal opinion. Moreover, Defendants-Petitioners fail to point out that at least two other state courts in related cases have ruled differently. In Wisconsin, the court permitted jurisdictional discovery as to all of the Canadian defendants except CADA (*Rasmussen v. General Motors*, No. 03-cv-1828). In Florida, the court permitted jurisdictional discovery on all of the Canadian defendants (*Beckford v. General Motors*, No. 03-6463).

In concluding that it could exercise specific jurisdiction over Daimler Canada, the District Court looked beyond the fact that Daimler Canada prevented automobiles manufactured in Canada from being exported to the U.S. Petition at 13. Rather, the District Court considered an array of conduct targeted towards U.S. markets. Among other things, the District Court looked to: (a) Daimler Canada's two-tiered distribution system; (b) its website touting the integration of its global and North American operations; (c) its use of no-export agreements designed to keep Canadian cars out of the U.S. market; (d) its communication with its dealers in both the U.S. and Canada on ways to keep cars out of the U.S. market; and (e) its refusal to honor warranties for cars sent into the U.S. market. Mem. Dec. at 18-20. Such activities directed toward the U.S. routinely give rise to personal jurisdiction. *U.S. v. Nippon Paper Indus., Co., Ltd.*, 109 F. 3d 1, 2 (1st Cir. 1997). For example, *In Nippon Paper*, the Court considered whether it could exercise personal jurisdiction over defendants whose conduct took place entirely outside the U.S., but was intended to produce, and did in fact produce, some substantial effect in the U.S. The *Nippon Paper* court concluded "the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach." *Id.* at 4. In light of this conclusion, there is no "substantial difference of opinion" that could justify interlocutory review of the District Court's specific jurisdictional findings.

V. CONCLUSION

Defendants-Petitioners have not met their heavy burden of establishing that this Court should grant their Petition for appeal under Section 1292(b). They have not shown that there are any controlling questions involving substantial differences of opinion that would materially advance the litigation if the extraordinary measure of interlocutory review is granted.

Accordingly, Plaintiffs-Respondents respectfully request that the Petition be denied in its entirety.

Dated: May 12, 2004

Respectfully submitted,

BERMAN DEVALERIO PEASE TOBACCO BURT & PUCILLO

By: /s/ Joseph J. Tabacco
JOSEPH J. TABACCO, JR.
SHARON T. MAIER
CHRISTINE G. PEDIGO
425 California Street, Suite 2025
San Francisco, CA 94104
Telephone: (415) 433-3200

R. SCOTT PALMER
MANUEL J. DOMINGUEZ
Northbridge Centre
Suite 1701
515 North Flagler Drive
West Palm Beach, FL 33401
Telephone: (561) 835-9400

KATHLEEN M. DONOVAN-MAHER
TODD A. SEAVER
One Liberty Square
Boston, MA 02109
Telephone: (617) 542-8300

Chair of Plaintiffs' Executive Committee

MILBERG WEISS BERSHAD & SCHULMAN LLP
MICHAEL M. BUCHMAN
J. DOUGLAS RICHARDS
MICHAEL R. REESE

One Pennsylvania Plaza
New York, NY 10119-0165
Telephone: (212) 594-5300

Vice-Chair of Plaintiffs' Executive Committee

BERNARD PERSKY
HOLLIS L. SALZMAN
GOODKIND LABATON RUDOFF & SUCHAROW LLP
100 Park Avenue
New York, NY 10017

ROBERT J. LAROCCA
WILLIAM E. HOESE
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107

PATRICK E. CAFFERTY
JENNIFER WINTER SPRENGEL
MILLER FAUCHER AND CAFFERTY LLP
30 North La Salle Street, Suite 3200
Chicago, IL 60602

H. ADAM PRUSSIN DONALD G. DAVIS
POMERANTZ ƬAUDEK BLOCK GROSSMAN & GROSS LLP
100 Park Avenue
New York, NY 10017

SAMUEL D. HEINS ALAN I. GILBERT
HEINS MILLS & OLSON, P.L.C.
3550 IDS Center
80 South Eighth Street
Minneapolis, MN 55402

STEPHEN LOWEY
JEANNE D' ESPOSITO
LOWEY DANNENBERG BEMPORAD &
SELINGER, P.C.
The Gateway
One North Lexington Avenue
White Plains, NY 10601

Plaintiffs Executive Committee

ROBERT S. FRANK
HARVEY & FRANK
Two City Center
Fourth Floor
Portland, ME 04112-0126

Liaison Counsel for Plaintiffs.